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BEFORE THE BOARD OF OIL, GAS & MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

In the matter of the Request for Agency Action of NEWFIELD PRODUCTION COMPANY for an order amending the Board's order entered in Cause No. 139- 90 to provide for retroactive application to the respective dates of first production from the drilling units established thereunder comprised of Section 28, Township 3 South, Range 2 West, U.S.M., and Section 12 of Township 3 South, Range 3 West, U.S.M., Duchesne County, Utah.	**Division of Oil, Gas and Mining's Memorandum in Opposition to the Request for Agency Action** Docket No. 2014-017 Cause No. 139-116

The Utah Division of Oil, Gas and Mining ("**Division**") submits the following Memorandum in Opposition, under Utah Administrative Code Rule R641-105-200, to Newfield Production Company's ("**Newfield**") request to backdate a spacing order in two sections. The request to backdate the spacing orders would violate the doctrine laid out by the Utah Supreme

Court in Cowling. The federal land agencies' laws and rules neither require the Board to backdate spacing orders nor prohibit communitization agreements for lands where spacing orders are entered and effective after the first date of production.

BACKGROUND FACTS

A. The lands subject to this request were originally spaced in 2012.

On March 8, 2012, Newfield submitted a request to the Board asking it to space certain lands in Duchesne County. Request for Agency Action at 2, 15, Newfield Prod. Co. ("**Newfield I**"), Docket No. 2012-013, Cause No. 139-90 (Bd. of Oil, Gas & Mining Mar. 8, 2012) (modified Apr. 9, 2012). The Board granted this request and spaced units over many sections of land on May 9, 2012. Findings of Fact, Conclusions of Law and Order, Newfield I, Docket No. 2012-013, Cause No. 139-90 (Bd. of Oil, Gas & Mining May 9, 2012). At the same time, the order said its effective date for one, particular section of land was to be retroactive to April 7, 2012, which was the date of first production for a well within that section.

Two of Newfield's wells, that is, the Nickerson #6-7-3-2W and Odekirk #11-12-3-3W wells ("**Nickerson**" and "**Odekirk**" wells, respectively), were spud and put into production before the Board entered its original, Newfield I spacing order on May 9, 2012. The Nickerson well first produced on March 21, 2012, producing 11,764 bbls and 10,955 mcf during the forty-nine days before the spacing order's existence. Pet'r's Exhibits, Newfield Prod. Co. ("**Newfield III**"), Docket No. 2014-017, Cause No. 139-116 (Bd. of Oil, Gas & Mining Mar. 7, 2014)

(Exhibit C). The Odekirk well first produced on April 14, 2012, producing 28,376 bbls and 20,901 mcf during the twenty-five days before the spacing order's existence. Id. (Exhibit E).

B. Newfield recently asked to force-pool the Nickerson and Odekirk wells, but continued it until May 2014, after the Board decides whether to backdate the Newfield I spacing order.

On January 10, 2013, Newfield requested the Board force pool five wells, including the Nickerson and Odekirk wells. Request for Agency Action at 2, Newfield Prod. Co. ("**Newfield II**"), Docket No. 2014-010, Cause No. 139-115 (Bd. of Oil, Gas & Mining Jan. 10, 2014). Newfield later asked the Board's Hearing Examiner to continue the matter in regard to the Nickerson and Odekirk wells until a later time. Hearing Examiner's Recommended Findings of Fact and Conclusions of Law at 2, Newfield II, Docket No. 2014-010, Cause No. 139-115 (Bd. of Oil, Gas & Mining Feb. 26, 2014). The Hearing Examiner granted the continuance. Id. And Board has granted Newfield's motion to continue the request to force-pool these two wells until next month's regular hearing on May 28, 2014. Second Order Continuing Portion of Hearing at 1, Newfield II, Docket No. 2014-010, Cause No. 139-115 (Bd. of Oil, Gas & Mining Mar. 25, 2014).

After Newfield first moved to continue the force-pooling matter involving the Nickerson and Odekirk wells, Newfield filed the current matter requesting the Board amend the original, Newfield I spacing order's effective date for the two sections where the Nickerson and Odekirk wells lie. Request for Agency Action at 5, Newfield III, Docket No. 2014-017, Cause No. 139-116 (Bd. of Oil, Gas & Mining Mar. 7, 2014).

C. The Odekirk well lies on a tract of land owned by an unlocatable mineral interest owner and a located, unleased mineral owner.

Based on conversations with Newfield, the Division believes there is one unlocatable, unleased working-interest owner and an unleased mineral interest owner of this private tract of land. It is currently unclear if the located, unleased mineral interest owner has agreed to share the pre-spaced production with the unit.

DISCUSSION

The Cowling holding that the law of capture generally prevents pooling orders from predating spacing orders guide the Board. Newfield should not be allowed to backdate the original spacing order to maneuver around the Cowling because there is no inequitable conduct here justifying a departure, because federal law does not require it, because to backdate spacing orders carries a risk of disturbing property rights even if the parties seem to waive those rights. The Memorandum will address each of these topics in turn.

I. To protect the law of capture the Board should not amend the effective date of spacing orders to make room for pooling orders.

Until a spacing order is entered, the law of capture largely governs oil and gas production. Cowling v. Bd. of Oil, Gas & Mining, 830 P.2d 220, 225, 228–29 (Utah 1991) see also Phillip Wm. Lear, Utah Oil and Gas Conservation Law and Practice, 1998 Utah L. Rev. 89 ("In Cowling . . . , the Utah Supreme Court held that, although the [Oil and Gas Conservation] Act might modify the rule, it did not displace it, ruling that the law of capture applied to the

drilling of exploratory wells under well location and siting rules and until entry of the Board's formal spacing order."). Accordingly, the Utah Supreme Court has held that "[a]n owner's failure to take action to establish and protect his or her interest in production prior to the entry of a spacing order constitutes a waiver of that interest until a drilling unit is established." Id. at 228 quoted with approval in Hegarty v. Bd. of Oil, Gas & Mining, 2002 UT 82, ¶ 36, 57 P.3d 1042 and Adkins v. Bd. of Oil, Gas & Mining, 926 P.2d 880, 884 (Utah 1996).

The court, in Cowling, described the development of Utah Oil and Gas law. In 1955, the Legislature modified the law of capture by passing the Utah Oil and Gas Conservation Act, which instituted what was the predecessor to the modern Board of Oil, Gas and Mining. Cowling, 830 P.2d at 224–25 see also Lear, supra, at 95–97 (providing a more detailed history). Although one purpose of the Conservation Act was to protect correlative rights, Utah Code Ann. § 40-6-1 (West 2013), those rights fail to guarantee a share of production determined by the volume of a pool a person owns. Cowling, 830 P.2d at 225. The Legislature made that clear by defining correlative rights as an owners' "***opportunity*** . . . to produce [their] just and equitable share . . . ." Utah Code Ann. § 40-6-2(2)) (emphasis added).

The Supreme Court, when discussing correlative rights, noted that they are sometimes unascertainable until the Board enters a spacing order. Cowling, 830 P.2d at 226. And because pooling agreements or forced-pooling orders are the tools to enforce correlative rights, "a pooling order must . . . be based on the existence of a drilling [or spacing] unit." Id.

Importantly, even though the court never explicitly prohibits the backdating of spacing orders, that must be the case when the spacing order defines correlative rights, largely terminates

the period when the producer may capture the resource under the law of capture, or both. If not, the Cowling holding would have little practical effect. The court said a spacing order is a "prerequisite" to pooling, id. at 228, and that for a well lying where "no preexisting . . . spacing order has been entered, the rule is that a pooling order should be effective no earlier than the date of the spacing order . . . ." Id. at 229. Logically, these statements rely on a spacing order's date of entry being fixed and immovable. Otherwise, the court would likely have discussed under what circumstances the Board might move the effective date of the spacing order. Especially because, in Cowling, that would have been an option for the Board because it denied a spacing request for lack of evidence in 1983, but later granted a request to space and force-pool in 1985, and then amended the effective date of the pooling order back to 1983. Id. at 222. So, although the Supreme Court never said the Board must not move spacing orders, the court must have intended them to remain fixed.

The Cowling holding should not be limited to the narrow set of facts of that case. The court discussed the history of the Ucolo No. 2 and how it "was the discovery well of the pool it drained, there[fore there] was no spacing order in effect when the well was completed." Id. The court did focused on how there was a lack of a spacing order, not the wildness or riskiness of the well. In fact, every time the court mentions "wildcat," "discovery," or "exploratory" wells, the court always discussed the importance of how they are not yet spaced. The important factor was that the well was unspaced, not whether it was part of a known field. Id. at 226, 227, 299. Furthermore, if the Board were to apply the Cowling holding to only risky wells, it would create confusion on who owns the production of any unspaced well. Operators and property owners

enjoy having clear rules, and if the Cowling holding were limited in that way, it would create confusion.

Note that backdating spacing orders to the date of the petitioner's filing date would still violate the Cowling holding. The court said that "until the Board acquires the necessary data in a formal hearing, makes findings of fact, and enters a spacing and drilling unit order" correlative rights are normally unascertainable. Id. at 226. And because correlative rights must be ascertained before they can be force-pooled, the entry of the spacing order is usually the soonest time when rule-of-capture production ends. In sum, it cannot be the filing of the petition because the rule of capture still governs until the entry of the spacing order. In Oklahoma, a pooling order can relate back to the filing date; however, under Oklahoma's statutes, the filing of a spacing petition triggers a ban on offset drilling which obstructs the law of capture. Kuykendall v. Helmerich & Payne, Inc., 741 P.2d 869, 872 (Okla. 1987). Because the petition filing effectively ends the law-of-capture production in Oklahoma, spacing and pooling orders are allowed to relate back to the filing date. Id. Utah's laws differ—mineral owners may offset drill to protect their interests up until a spacing order prohibits it. Cowling, 830 P.2d at 228. Therefore, backdating spacing or pooling orders to the filing date of a spacing order is unwarranted.

In sum, the Cowling holding means that a spacing order should not be amended to allow a pooling order to get to a place where it was once prohibited. An unwarranted amendment to a spacing order should not sidestep the prohibition of pooling orders predating spacing orders. There is an exception to this rule, but Newfield should not be able to claim it in this matter.

II. No special circumstances justify allowing a pooling order to take effect before the original entry date of the spacing order.

The court, in Cowling, also held that under certain "inequitable or overreaching conduct," a pooling order may predate a spacing order. Id. at 227, 229. The court discussed how the Nebraska Supreme Court allowed this to "remedy inequitable conduct" by a party who employed "'obvious delaying tactics.'" Id. at 227 (discussing and quoting In Re Farmers Irrigation Dist., 194 N.W.2d 788, 792 (Neb. 1972)). A petitioner's oversight is not one of those circumstances. When the law of capture governs, a late request for a spacing order must not be an inequitable outcome because then almost any spacing order entered after first date of production could be backdated. Imagine if courts allowed mistakes to overcome a statute of limitations.

III. The existence of federal, Indian, or allotted land lying within the spaced lands should not affect the Board's decision.

Indian and allotted lands lie within the spaced sections that are the subject to Newfield's request. But this should not affect the Board's analysis because the federal agencies can still enter cooperative agreements pooling rights even if the spacing order comes after a well has produced. Neither the Bureau of Land Management ("**BLM**") nor the Bureau of Indian Affairs ("**BIA**") are bound by any law, rule, or formal policy or guidance that would prohibit them from entering into a cooperative agreement that pooled only those resources produced after a spacing order coming after the first date of production.

Congress instructs the BLM to follow conservation principles, such as maximizing production and minimizing waste, see 30 U.S.C. § 226(m) (2012); however, Congress instructs BIA to consider the Indians' best interests, Kenai Oil & Gas, Inc. v. Dep't of Interior, 671 F.2d 383, 387 (10th Cir. 1982). Yet, before the BIA may make a decision on whether to pool resources, it must confer with the BLM, so the BLM's rules and policies affect BIA's decisions. See 25 C.F.R. §§ 211.3, 211.4, 212.3, 212.4 (2011). Accordingly, BLM's rules will be analyzed first; followed by the BIA's.

A. BLM's rules and manuals do not require the Board to backdate spacing or pooling orders.

The Mineral Leasing Act, as amended, allows the BLM to enter communitization agreements that pool production of federal and private land "[f]or the purpose of properly conserving the natural resources . . . ." 30 U.S.C. § 226(m). Congress likely envisioned the BLM as working cooperatively with state conservation agencies unless the BLM found it in the public interest to create a federal unit, overriding the state laws and rules. See id. Likewise, Congress gave the BLM the power to enter communitization agreements. Id.

> When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease . . . may be pooled with other lands . . . under a communitization . . . agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the . . . spacing unit when determined . . . to be in the public interest . . . .

Id. Note that Congress did not limit, nor discuss, BLM's powers to enter an agreement based on the effective date of a spacing order.

One BLM rule says that "communitization agreements are considered effective from the date of the agreement or from the [first] date of . . . production . . . , whichever is earlier, ***except when the spacing unit is subject to a State pooling order after the date of first sale, then the effective date of the agreement may be the effective date of the order.***" 43 C.F.R. § 3105.2-3(b) (2013) (emphasis added). A plain reading of this language directly shows that a spacing order entered after the first date of production does not preclude agreements.

Additionally, BLM's manuals provide guidance on when cooperative agreements may become effective. The manual says that a communitization agreement

> may be formed at any time before or after the commencement of drilling operations. . . . The [communitization agreement] is effective from the date of the agreement or from the [first] date of . . . production . . . , whichever is earlier, or in some cases, ***the effective date may be the same as the effective date of a State pooling order.***

Bureau of Land Mgmt., Dep't of the Interior, BLM Manual Handbook 3105-1, Cooperative Conservation Provisions 23 (1994) (emphasis added) (citing 43 C.F.R. 3105.2-3(b)). Another

manual that provides more "[d]etailed guidance and procedures for [the BLM's] approval," id. at 24, says,

> Approved communitization agreements are considered effective from the date of the agreement or from the [first] date of . . . production from the communitized parcels, whichever is earlier. ***An exception to this rule would be when the spacing unit is force pooled by State order after the date of first sales.*** In this instance, the effective date of the communitization agreement may be the effective date of the order.

BLM Manual § 3160-9.1.D (1988) (emphasis added). Furthermore, the BLM manual anticipates an operator bringing a well into production before a state enters a spacing order. Id. § 3160-9.1(G)(3).

> 3. Absence of State Spacing. When no applicable State spacing exists, the authorized [BLM] officer, in approving the [application for a permit to drill], should notify the operator that once the target formation in the area has been spaced, the appropriate acreage to be dedicated to the well will be determined and that a [communitization agreement] may be required at that time if the well is productive.

Id. Notice the manual does not require the officer to refrain from issuing the permit until after the spacing, but instead requires only that the officer notify the operator. Furthermore, it acknowledges that a communitization agreement might come into affect when it is obvious whether the well is productive or not—logically this would be after the first date of production.

Not one of these laws, rules, or manuals precludes the BLM from participating in a pooling agreement that starts after first date of production. Furthermore, there is neither a requirement that the Board backdate a spacing order nor is there a special circumstance justifying the backdating of the spacing order.

B. BIA's rules do not require the Board to backdate spacing or pooling orders.

Congress and the BIA's rules refrain from requiring the Bureaus or the Board to backdate spacing or pooling orders. Congress gave the BIA discretion in deciding whether to accept a communitization agreement. Kenai Oil, 671 F.2d at 385 (citing 25 U.S.C. § 396d). The BIA's considerations differ from the BLM's because the BIA must consider more than conservation principles; instead, it "must take the Indians' best interests into account when making any decision involving leases on tribal [or allotted] lands." Kenai Oil, 671 F.2d at 387; see also 25 C.F.R. §§ 211.28(a), 212.28(a) (2011) (requiring the BIA to consider the mineral owner's interest in addition to conservation policies). The BIA rules discuss what "best interest" means in the context of accepting communitization agreements.

> In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a . . . communitization agreement), the ***Secretary shall consider any relevant factor***, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability of land concerned; need for change in the terms of the existing lease; marketability; and potential environmental, social, and cultural effects.

25 C.F.R. §§ 211.3, 212.3 (emphasis added). With that in mind, the BIA rules affecting tribal and allotted lands say,

> ***Unless otherwise provided in the cooperative agreement***,[1] approval of the agreement commits each lease to the unit in the area covered by the agreement on

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[1] BIA's rules define "cooperative agreement" to mean "a binding arrangement between two or more parties purporting to the act of agreeing or of coming to a mutual arrangement that is

> the date approved by the Secretary or the date of first production, whichever is earlier, as long as the agreement is approved before the lease expiration date.

Id. §§ 211.28(f), 212.28(f) (emphasis added). First, the plain reading of these subsections permits the BIA or BLM to provide an exception to the rule because of the "unless" clause. Second, this subsection addresses only when the leases for tribal or allotted mineral rights are committed to a unit, and not when private leases commit to the unit—not to mention unleased lands. See id. §§ 211.3, 212.3 (defining "lease" as "any contract, approved by the Secretary of the Interior under the [Mineral Leasing] Act . . . that authorize exploration for, extraction of, or removal of any minerals."). Third, and finally, if the BIA had meant to require the leases to commit to a unit by the first date of production, it presumably would have included it in the "as long as" clause that created a mandatory condition.

Similarly, when the BIA issued its final rule even though the BIA discussed sections 211.28 and 212.28, and comments about them, the Bureau failed to suggest or intimate that these sections required state spacing or pooling orders to be effective on the first date of production. Leasing of Tribal Lands for Mineral Development, 61 Fed. Reg. 35,634, 35,637–39, 35,644–45 (July 8, 1996). Note that the BIA does not provide any further guidance to this language in its manual. See The Indian Affairs Manual, http://bia.gov/WhatWeDo/Knowledge/Directives/IAM/ (last updated Apr. 8, 2014).

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accepted by all parties to a transaction (e.g., communitization and unitization)." Id. §§ 211.3, 212.3.

After looking at the laws and rules affecting the BLM and BIA, it is difficult to conclude that cooperative agreements must start on or before the first date of production—unless there is some internal policy of which the Division is unaware. The best argument for such a conclusion would be if unlocatables existed and the BLM or BIA conditioned their acceptance on the unlocatables being force-pooled.[2] Yet that still falls short of requiring the Board to backdate spacing or pooling orders because a pooling order could still replace the unlocatables' acceptance to the agreement, albeit at a date later than first production.

IV. The prior Board holdings do not justify abandoning the Utah Supreme Court's precedent.

Based on representations made in the past that the BLM and BIA required the Board to retroactively apply spacing orders, there have been a handful of orders backdating spacing orders to the first date of production. XTO Energy, Inc., Docket No. 2014-003, Cause No. 245-07 (Bd. of Oil, Gas & Mining Mar. 7, 2014) (noting no objections, prior unit-wide sharing, and tacit agreement between parties); ConocoPhillips Co., Docket No. 2014-001, Cause No. 243-12 (Bd. of Oil, Gas & Mining Mar. 7, 2014) (noting Division support, no objections, prior unit-wide

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[2] Indeed, the BLM manual anticipates this situation. BLM Manual § 3160-9.1.F ("[A] communitization agreement signed by the operator and complete in all respects, except for signatures of all working interest and royalty owners, may be accepted and approved by the authorized officer when a State order force-pooling such interests in the land s in question is also submitted.").

sharing, and finding that the area had once been part of a federal unit); Newfield I, Docket No. 2012-013, Cause No. 139-90 (noting Division's support, BLM's support, no pertinent objections, and three working-interest owners' support); Bill Barrett Corp., Docket No. 2011-019, Cause No. 139-87 (Bd. of Oil, Gas & Mining Dec. 6, 2011) (noting Division support, BLM statement, no objection, desire to avoid interference with contracts, and prior unit-wide sharing); Texaco Exploration & Prod., Inc., Docket No. 99-005, Cause No. 245-1 (Bd. of Oil, Gas & Mining July 7, 1999) (noting Division and BLM support, no objections, and notification sent to royalty and working interest owners).

The Division has traditionally supported request to backdate a spacing order because of the representations about federal law and the parties seemed to be united in waiving any injury they might suffer by asking for backdating. However, after more research in the federal requirements it will look more carefully in the future. As discussed above, the federal laws do not require spacing orders be backdated to first date of production before a communitization agreements can be formed. This conclusion is especially persuasive where, for the first time, the request to backdate the spacing order is to enable a force-pooling order to predate the original entry date of a spacing order.

Furthermore, this precedent does not oblige the Board to continue granting retroactive spacing orders. An agency's contradiction from prior practice is allowed if the "inconsistency is justified by a fair and rational basis." Pentskiff Interpreting Servs. v. Dep't of Health, 2013 UT App 156, ¶ 3, 305 P.3d 214; accord Utah Code Ann. § 63G-4-403(4)(h)(iii).

V. The law of capture allows parties to waive their right to production, but it might be safer for the Board to not get involved.

Because the spacing order's effective date should be the same day it was originally entered and because the law of capture governs unspaced lands, the mineral owners of the tracts containing the Nickerson and Odekirk wells are entitled to the law-of-capture production, which predated the spacing order. These mineral owners captured the resource before their neighbors took the opportunity to offset drill or obtain spacing and pooling orders. The neighbors' failure to protect their interest waived their right in the production. Therefore, the mineral owners of the tracts containing the Nickerson and Odekirk have the sole right in the rule-of-capture production and its proceeds.

Admittedly, these owners may waive their rights and give or share production to the other owners of the spaced section in an effort to be friendly neighbors; however, to do so does not require the Board's involvement. The owners are free to form their own agreements with their neighbors. And if the Board's order is not necessary for the parties to reach the end they seek, maybe the best course of action is to step aside and let the parties work it out themselves. As the Utah Supreme Court said, in Hegarty, "a good law, like a good parent, does nothing for a person that he or she can do independently . . . ." 2002 UT 82, ¶ 40. The Board could continue to be involved and acknowledge the mineral interest owners waiving their rights, but where there is a risk of disturbing property rights under a pending forced-pooling request, see Cowling, 830 P.2d at 227, the more safe approach would be to not.

Noteworthy, for the Odekirk well, an agreement may be difficult to obtain because a mineral owner entitled to rule-of-capture production remains unlocatable, so there is at least one mineral owner who does not agree to waive their rights. Importantly, this difficulty in forming an agreement does not justify force-pooling their rule-of-capture, pre-spaced production because even unlocatables are entitled to production proceeds. Utah Code Ann. § 40-6-9 (requiring producers to hold proceeds in escrow while a party is unlocatable). However, all production after the May 9, 2012 spacing order, is subject to a retroactive pooling order—assuming that all other requirements have been satisfied.

CONCLUSION

Respectfully, the Board should deny Newfield's request because of the Cowling precedent, the lack of a federal requirement to do so, and out of a respect of the individual's right to reach a private agreement without the board's involvement. To do otherwise might expose the board to risks of unduly disrupting people's property rights.

RESPECTFULLY SUBMITTED this 11TH day of April, 2014.

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I hereby certify that I caused a true and correct copy of the foregoing **DIVISION OF OIL, GAS AND MINING'S MEMORANDUM IN OPPOSITION TO THE REQUEST FOR AGENCY ACTION** for Docket No. 2014-017, Cause No. 139-116, to be mailed with postage prepaid, via E-mail or First Class Mail, this 11th day of April, 2014, to the following:

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